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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58	)	CC Docket No. 87-266
	)	
and	)	
	)	
Amendments of Parts 32, 36, 61, 64, and 69 of the Commission's Rules to Establish and Implement Regulatory Procedures for Video Dialtone Service	)	RM-8221

Comments of Bell Atlantic
on Petitions for Reconsideration and
Clarification of Video Dialtone Reconsideration Order

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1. Introduction and Summary

The petitions for reconsideration filed by Ameritech and certain cable operators present the Commission with a stark choice. The Commission can do as Ameritech proposes and eliminate redundant and burdensome regulatory barriers to telephone company entry into the video market and provide regulatory flexibility to allow telephone companies to compete effectively with cable. Or it can do as the cable operators suggest and erect further barriers to video market entry by imposing additional unnecessary and inflexible requirements on video dialtone providers.

The Commission's approach to regulating the wireless industry could serve as a valuable model. In a recent speech, Chairman Reed Hundt, after noting the rapid growth and extraordinary market success of the wireless industry, described the Commission's regulatory approach to that industry. Observing

that the Commission's "overarching goal was to create as many viable competitors as we possibly could so that the market would do our job for us," he noted that the Commission "did not develop hundreds of pages of rules to govern [the] industry" but instead allowed "competition [to] replace[] regulation."[1] In addition, the Commission streamlined the licensing process to allow PCS auction licensees to obtain their licenses in record time,[2] sought to ensure that local regulation does not derail wireless deployment,[3] and will not sanction "continued rate regulation in markets that are demonstrably competitive [because that] disserves the interests of consumers." [4]

Bell Atlantic urges the Commission to give the nascent video dialtone industry the same chance by:

- Creating as many viable competitors as quickly as possible by expeditiously approving all Section 214 applications and authorizing rate structures that encourage start-up entrepreneurial programming ventures;
- Letting market competition replace government regulation;
- Eliminating or significantly streamlining and expediting the Section 214 application and Part 69 waiver processes;

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[1] Remarks of FCC Chairman Reed E. Hundt, CTIA Convention, New Orleans, LA, at 9 (Feb. 1, 1995).

[2] Id. at 8-9. Such licenses were issued within 60 days after the auction closed.

[3] Id. at 11.

[4] Id. at 12.

- Encouraging local authorities not to derail video dialtone deployment; and
- Eliminating rate regulation for video dialtone and cable operators alike when there is effective competition in any video market.

Consistent with those guiding principles, the Commission should grant Ameritech's petition and deny the cable operators' petition in its entirety.[5]

2. The Commission Should Not Place Arbitrary Limits on the Amount of Capacity A Single Programmer-Customer May Purchase

In its order on reconsideration of the video dialtone rules, the Commission concluded that telephone companies may not allocate all or substantially all of the analog capacity on a video dialtone platform to a single "anchor programmer."[6] Ameritech asks the Commission to reconsider or clarify that its decision does not place fixed or arbitrary numerical limits on the amount of

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[5] Bell Atlantic takes no position on Liberty Cable's petition asking the Commission to reconsider its decision to disallow "anchor programmers" so long as any anchor programmer is required to share its channels with all programmer-customers. However, as we recently explained in a related proceeding, the Commission should not prescribe any particular channel sharing arrangement but should allow video dialtone providers to provide the types of channel sharing arrangements most appropriate for their markets and chosen architecture. Comments of Bell Atlantic on Third Further Notice of proposed rulemaking, CC 87-266, RM-8221 (filed Dec. 16, 1994).

[6] Telephone Company-Cable Television Cross-Ownership Rules, Section 63.54 - 63.58, 7 FCC Rcd 5781 (1992) ("Video Dialtone Order"), on reconsideration, Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking at ¶ 35, CC 87-266, RM-8221, (rel. Nov. 7, 1994) ("Reconsideration Order").

available analog capacity any single programmer can purchase, thus permitting programmers to purchase enough capacity to compete effectively with the incumbent cable provider in any particular market.[7]

Both Ameritech and Bell Atlantic have proposed voluntarily to limit initial purchases by any single programmer-customer during the first year of video dialtone service to 50% of capacity.[8] Both have also proposed, however, to lift that restriction at the end of the first year to permit any programmer to purchase any unused capacity.[9] In its recent order authorizing Ameritech's Section 214 applications, however, the Commission explicitly rejected Ameritech's proposal to allow any programmer to lease unused capacity after one year, regardless of the amount of capacity previously purchased. The Commission's rationale was that lifting the limit after one year "could permit one programmer to control substantially all of the analog channels."[10]

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[7] Ameritech's Petition for Reconsideration and Clarification of the Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking at 2-5 (filed Jan. 11, 1995) ("Ameritech Petition").

[8] Application of Ameritech Operating Cos., W-P-C 6926-30, Order and Authorization at ¶ 5 (rel. Jan. 4, 1995) ("Ameritech Order"); see, e.g. Application of the Bell Atlantic Tel. Cos., W-P-C 6966, Application at 17 (filed Jun. 16, 1994) ("Bell Atlantic Application").

[9] Bell Atlantic would also conduct a second open enrollment period at that time to give all programmers an equal, nondiscriminatory opportunity to obtain additional capacity and ensure that no single programmer could purchase all of the remaining capacity. Bell Atlantic Application at 17.

[10] Ameritech Order at ¶ 28.

Our proposals ensure that one large programmer cannot buy up all of the capacity on a video dialtone platform at the very outset, thereby depriving other programmers of access to the common carrier platform. Moreover, the initial allocation of capacity in a fair and nondiscriminatory manner is buttressed by the opportunity for a second round of allocation of the additional unused capacity.

Bell Atlantic shares Ameritech's view that, in order to provide a viable competitive alternative to cable, video dialtone systems must have flexibility to provide programmers with sufficient capacity to offer consumers programming packages that are at least comparable to their current cable service. Any artificial numerical or percentage limits on the amount of capacity a single programmer can buy -- whether analog or digital -- places video dialtone programmers, who are trying to gain market entry, at a competitive disadvantage to incumbent cable operators, whose service is currently available to over 95% of American homes and to which over 60% subscribe.[11]

Moreover, economically wasteful restrictions that force video dialtone platform providers to let significant amounts of capacity go unused despite demand deprive the telephone company of valuable revenue streams. Such draconian economic penalties will result in higher video dialtone service prices to programmers, and

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[11] As of July 1994, 63.4% of all households with television subscribed to basic cable service. Research and Policy Analysis Dept., Nat'l Cable Television Ass'n, Cable Television Development at 1-A (Fall 1994).

ultimately to consumers. More importantly, a regulatory requirement forcing telephone companies to let unused plant capacity lie idle for an extended period of time, despite demand from existing customers, on the off-chance that some later customer might want it, would constitute an unconstitutional regulatory "taking" of telephone company property.[12] The Commission's suggestion that it would entertain a waiver request if "large numbers of channels were unused over an extended period of time"[13] does not wholly solve the problem. Such discretionary relief, granted only after an extended period of economic loss, will not encourage telephone companies to invest the significant capital required to deploy video dialtone networks.

3. The Commission Should Consolidate in One Streamlined Proceeding Consideration of Rate Elements, Rates and Cost Support for Video Dialtone Service

As a result of the Commission's decision to classify video dialtone as a switched, rather than special, access service, telephone companies are now required to go through three separate and sequential approval proceedings in order to offer video dialtone service. First, authorization under Section 214 must be obtained in order to construct the facilities. Once the Section 214 application is granted, the company must file for a waiver of the Commission's Part 69 rules governing access services to establish rate elements that fit this new service. In addition,

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[12] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982); accord Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2893 (1992).

[13] Ameritech Order at ¶ 28.

the company must file proposed tariffs for the service,[14] which starts a third proceeding. Moreover, tariffs cannot be approved until after the company receives the related Part 69 waiver. Each of these proceedings may take months or years. The result: two-and-a-half years after the FCC's original authorization of video dialtone service to bring choice and competition to the video delivery market, not a single commercial video dialtone service is yet in operation. These proceedings should be consolidated and streamlined in order to permit more expeditious market entry.[15]

A. Video Dialtone Is Appropriately Classified as a Special Access Service Requiring No Part 69 Waiver

For the reasons stated in Ameritech's petition, the Commission should reconsider its decision to classify video dialtone service as a switched access service, and require Part 69 waivers. Video dialtone is more appropriately classified as a special, rather than a switched, access service.

With regard to the ADSL-based on-demand service Bell Atlantic will offer in its northern Virginia market trial, the video signal travels over a dedicated facility to the video

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[14] FCC Public Notice, Common Carrier Bureau Establishes Procedures for Tariff Filing and Part 69 Rate Structure Waiver Request for LEC Video Dialtone Market Trials, DA 95-144 at 2 (Feb. 2, 1995) ("Market Trial Procedures Public Notice").

[15] As Bell Atlantic has previously noted, there should be no need for any Section 214 authorization when telephone companies upgrade existing facilities to provide a video dialtone capability. Petition of Bell Atlantic for Limited Reconsideration and for Clarification at 7-9 (filed Oct. 9, 1992).

switch,[16] an arrangement closely resembling a special access channel termination. The video switch routes the signal, just as a packet switch routes a packet Switch Multi-Megabit Data Service ("MMDS") or Frame Relay signal, and it is transported to the serving wire center. From the wire center, the signal travels over facilities dedicated to each end user, similar to a special access channel termination. Accordingly, in structure, the service resembles special access.

The fact that some video dialtone services may include some switching functions does not make it switched access. A number of other services use switching but are not part of the interstate switched access tariff. Among those services are analog video switching, SMDS, IntelliMux™Service, and Frame Relay Service.[17] Even interactive video dialtone services that involve some switching to direct particular programming or services to a particular subscriber are more closely analogous to special access services. Unlike switched access services that permit delivery of a signal anywhere in the public switched network, such interactive video services share a distinguishing characteristic of special access services: they permit delivery of a signal only from a particular group of customers to a particular set of end users.

More importantly, some video dialtone services, such as

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[16] This is not the same switch used for local exchange or switched access service.

[17] See Bell Atlantic Tariff F.C.C. No. 1, §§ 7.2.5 (analog video switching), 16.2.1 (SMDS), 7.2.12 (IntelliMux™) and 16.3.1 (Frame Relay).

the broadcast and narrowcast channel services Bell Atlantic will initially offer over its video dialtone platform in Dover Township, New Jersey, involve no switching whatsoever. Video dialtone should therefore be considered a special access service. As with other special access services, provision of video dialtone service should not require a Part 69 waiver.[18]

B. All Rate-Related Issues Should Be Resolved in One Consolidated Proceeding

If, however, the Commission affirms its decision to treat video dialtone as a switched access service, it should combine the Part 69 waiver and tariff review process in a single consolidated proceeding. Consolidation would shorten the time frames required to permit initiation of service, and reduce administrative burdens on the Commission, its staff and applicants by eliminating redundant proceedings. It would, nevertheless, still allow the Commission and interested parties to review and resolve any concerns relating to proposed rate elements, rates or cost support. In fact, a single consolidated proceeding is consistent with the approach recently adopted by the Commission for processing tariffs and Part 69 waivers for video dialtone market trials.[19]

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[18] Policy and Rules Concerning Rates for Dominant Carriers, 6 FCC Rcd 2637, ¶ 130 n.178 (1991) ("Part 69 does not . . . prescribe a special access rate structure. Rate structure changes for special access services can therefore be implemented in the tariff review process.").

[19] Market Trial Procedures Public Notice. The only significant difference between the Commission's approach to market trials and our proposal is that no separate Part 69 waiver filing would be required. Consideration of proposed tariff rate elements and rate structure, as well as proposed rates and cost support, would be addressed in a single tariff proceeding.

Not surprisingly, the cable industry petitions for exactly the opposite result: imposition of additional burdensome and time consuming proceedings and requirements in order to further delay the advent of video competition and provide cable operators with additional competitively sensitive information that cable is not required to disclose.[20] They exhort the Commission to impose a fourth sequential and redundant proceeding -- the filing of a tariff review plan -- and burden the Part 69 proceeding with additional detailed regulatory requirements for provision of irrelevant, redundant and proprietary information.

Requiring telephone companies to file tariff review plans to demonstrate how costs will be recovered by tariffed rate elements[21] is redundant of the tariff process. Instead of "simplifying" the tariff process as cable suggests, its proposal would instead duplicate the cost support and justification for each rate that telephone companies must provide when they file their tariffs, and further delay the tariff process by imposing yet another prerequisite to tariff filing.

Nor is there any need to establish additional "generic requirements" for Part 69 waivers.[22] First, telephone companies are already required to "unbundle video dialtone service to the same extent that other services are unbundled under the

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[20] Petition for Reconsideration of Comcast Cable Communications, Inc., Cox Enterprises, Inc., Jones Intercable, Inc. (filed Jan. 12, 1995) (the "Cable Petition").

[21] Id. at 17.

[22] Id. at 14.

Commission's Open Network Architecture and expanded interconnection policies."[23] Second, Section 202(b) of the Communications Act already requires nondiscriminatory pricing and similar prices for "like" services. Third, under the Commission's tariff rules, telephone companies are already required to show how each tariffed video dialtone rate element recovers the cost of providing that service, and justify term and volume discounts. Moreover, none of these issues fall within the scope of a Part 69 proceeding; they are tariff issues. Finally, it is impossible for telephone companies to describe precisely which costs will be assigned to the interstate and intrastate jurisdictions, particularly where no actual data on which to base such an assignment yet exists. Such costs will, however, be assigned in accordance with the methodologies described in the tariff filings, subject to the Commission's approval, and in accordance with the Commission's separations rules.

Finally, any attempt by the Commission to seek uniform or generic Part 69 requirements or tariff rate elements for video dialtone service would unnecessarily limit the ability of each telephone company to propose services and rate elements appropriate to its particular markets, architectures and other factors. Such additional uniform requirements are particularly inappropriate in

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[23] Id. n.28. In fact, in response to legitimate concerns raised in comments concerning Bell Atlantic's Part 69 waiver request for video dialtone, Bell Atlantic voluntarily amended its waiver request to propose further unbundling to facilitate interconnection to its video network by other transport providers. Amendment of Petition for Expedited Waiver of Part 69 Rules, DA 94-1345 (filed Jan. 27, 1995).

the case of video dialtone -- a wholly new competitive service that has not yet been deployed anywhere on a commercial basis.

4. Imposition of Additional Regulatory Burdens and Requirements for Video Dialtone Applications are Unnecessary and Inappropriate

The cable petitioners urge the Commission to adopt extremely detailed requirements for the financial information to be included in Section 214 applications in order to "simplify" the preparation of financial exhibits and facilitate review by interested parties and the Commission. Cable's proposed uniform format -- some of which is completely irrelevant to provision of video dialtone facilities[24] -- is a transparent attempt to obtain competitively sensitive cost information during the construction permit process that goes beyond what telephone companies are required to file even at the tariff stage, and at a much earlier point in time. Disclosing such information to competitors in any other setting would likely raise serious questions under the antitrust laws.[25] Moreover, the Commission has affirmed repeatedly

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[24] The cable operators would require telephone companies to provide details on the amount of submarine and deep sea cable, large PBX, and aircraft investment and expenses incurred in building their video dialtone networks. See Cable Petition, Exhibit 1, at 2-3.

[25] In fact, the detailed financial and business information telephone companies are already required to disclose in connection with their Section 214 applications provides highly valuable proprietary and competitive intelligence to the cable industry and other potential video delivery providers -- information cable is not, but should be, required to make public to telephone companies. Such data includes sensitive cost and projected revenue information, demand assumptions, breakeven and cash flow analyses, and detailed descriptions of their proposed architecture, engineering and geographic deployment plans. The asymmetric regulatory requirement to disclose such financial information,

that Section 214 authorization requires only a prima facie showing that anticipated incremental revenues from video dialtone service will exceed the incremental costs of providing the service.[26] Cable's proposed disclosure requirements go far beyond what is required for the Commission to determine if such a prima facie showing has been made.

Even more outrageous is cable's suggestion that the Commission should dismiss the Section 214 applications of a telephone company that fails to demonstrate the existence of local exchange competition in the market it proposes to serve.[27] In the first place, the cable industry already competes with telephone companies for their most lucrative business; cable companies, for example, control over 50 percent of the revenues earned by competitive access providers. And while the cable industry routinely claims some large number of states have not yet authorized local exchange competitors, for the most part they have not been asked. In any event, full local exchange competition requires resolution of unique issues that pose technical challenges and raise difficult public policy issues best resolved at the local level, such as universal service, interconnection terms, and similar concerns. Moreover, coercive action by the Commission --

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which could easily permit cable competitors to forecast potential prices, already seriously handicaps telephone companies in their ability to enter cable's monopoly markets.

[26] New Jersey Bell Tel. Co., 9 FCC Rcd 3677, ¶ 37 (1994); Ameritech Order at ¶ 43.

[27] Cable Petition at 13.

in particular, penalizing telephone companies in order to pressure local public service commissions to adopt regulatory policies that the Commission believes are desirable -- would exceed its statutory authority, impermissibly usurp state jurisdiction over local exchange service,[28] and violate the constitutional right of telephone companies to provide competing video services. And from the consumer's standpoint, the effect would be yet another occasion to delay the onset of competition in the video market.

Finally, the Commission should reject cable's exhortation to require telephone companies to provide detailed information concerning any relationship it has with video dialtone packagers and programmers, both when it files a Section 214 application and on an ongoing basis. Two Federal appeals courts,[29] and seven Federal district courts,[30] have all held that the statutory cross-ownership bar is unconstitutional, and have enjoined its enforcement against most of the nation's telephone companies. As a result, telephone companies have a First Amendment right to have full ownership rights, including cognizable interests, in any video

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[28] 47 U.S.C. §§ 152(b), 221(b).

[29] Chesapeake and Potomac Tel. Co. v. U.S., 42 F.3d 181 (4th Cir. 1994); U S West, Inc. v. U.S., No. 94-35775, slip op. (9th Cir. Dec. 30, 1994).

[30] Chesapeake and Potomac Tel. Co. v. United States, 830 F. Supp. 909 (E.D. Va. 1993); U S West, Inc. v. United States, 855 F. Supp. 1184 (W.D. Wash. 1994); NYNEX Corp. v. United States, Civil No. 93-323-P-C (D. Me. Dec. 8, 1994); BellSouth Corp. v. United States, 868 F. Supp. 1335 (N.D. Ala. 1994); Ameritech Corp. v. United States, 867 F. Supp. 721 (N.D. Ill. 1994); United States Tel. Ass'n v. United States, CA No. 94-1961 (D.D.C. Jan. 27, 1995); GTE South, Inc. v. United States, C.A. No. 94-1588-A (E.D. Va. Jan. 13, 1995).

programmer in-region. So long as those affiliated programmers purchase video dialtone service on the same tariffed terms and conditions as unaffiliated programmers, the details of their business relationships is irrelevant to any legitimate regulatory goal. The issue of whether the presence of an affiliated programmer changes the Commission's previous conclusion that Title VI is not applicable to video dialtone is already being examined in the Fourth Notice of Proposed Rulemaking, and requires no reconsideration of the Reconsideration Order.

Once again, cable is seeking to use the regulatory process to gain additional valuable, competitively sensitive information it has no right to know, and will use to further entrench and advantage itself in the very markets the telephone companies are simply attempting to enter. Moreover, each of these additional proceedings and burdensome requirements will enable cable to achieve its ultimate goal -- delaying indefinitely the onset of effective competition in the video market.

Conclusion

For the reasons stated above, the Commission should grant Ameritech's petition for reconsideration and deny the cable operators' petition in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "Comments of Bell Atlantic on Petitions for Reconsideration and Clarification of Video Dialtone Reconsideration Order" was served this 9th day of February, 1995, by United States Mail, first class, postage prepaid, upon the parties on the attached list.

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